Supreme Court, U. S.
FILED
MAY 23 1979
MICHAEL RODAK, JR., CLERK

78-1655

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-2655

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

FARMER'S HOME MUTUAL INSURANCE COMPANY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION I

SKEEL, MCKELVY, HENKE,
EVENSON & BETTS
INGRID W. HANSEN
JOHN C. PATTERSON
Attorneys for Respondent

Office and Post Office Address:
40th Floor, Bank of
California Center
Seattle, Washington 98164
(206) 623-1031

CRAFTSMAN PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

Page

Summary of Argument 1

Facts 2

Law and Argument 3

Conclusion 8

TABLE OF AUTHORITIES

Table of Cases

Dow Chemical v. Tug Thomas Allen,
349 F. Supp. 1354 (E.D. La. 1972) 5

Eagle Leasing Corp. v. Hartford Fire Ins. Co.,
540 F.2d 1257 (5th Cir. 1976) 4

Employers Mutual Liability Ins. Co. v. Aetna Ins. Co.,
254 F. Supp. 263 (E.D. Mich. 1966) 5

Heim v. City of New York,
442 F. Supp. 35 (E.D. N.Y. 1977) 7

Irwin v. Eagle Star Ins. Co.,
455 F.2d 827 (5th Cir. 1972) 3

Lanasse v. Travelers Ins. Co.,
450 F.2d 580 (5th Cir. 1971) 5

National Union Fire Ins. v. United States,
436 F. Supp. 1078 (M.D. Tenn. 1977) 7

Navegacion Goya, S.A. v. Mut. Boiler & Mach. Ins.,
411 F. Supp. 929 (S.D. N.Y. 1975) 3

Roberts v. Grammer,
432 F. Supp. 16 (E.D. Tenn., N.D. 1977) 6-7

Walter v. Marine Office of America,
537 F.2d 89 (5th Cir. 1976) 3

Wedlock v. Gulf Mississippi Marine Corp.,
554 F.2d 240 (5th Cir. 1977) 5

Wilburn Boat Co. v. Fireman's Fund Ins. Co.,
348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955) 3

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-2655

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

FARMER'S HOME MUTUAL INSURANCE COMPANY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION I

SUMMARY OF ARGUMENT

The petitioner, Insurance Company of North America (INA), asserts that the Court of Appeals, Division I for the State of Washington has refused to follow controlling Admiralty Law in its construction of a yacht policy. It is well settled that in the field of marine insurance contracts, state law will govern in all instances except where there is a clearly established federal rule. In the circumstances presented here, no admiralty rule clearly controls, and the state court was free to and did interpret the policy according to general contract and insurance principles.

FACTS

The parties to the underlying action, two husbands and wives, had been on a pleasure cruise for a few hours in the evening aboard a 50 foot yacht. This was a purely social visit, and at the conclusion of the brief cruise, the couples returned to the moorage. The slip consisted a concrete area and short pier located in the front yard of the defendant Lindruds' home on Lake Washington. The accident occurred approximately one-half hour after the vessel had been secured. Mr. Thorson, who was standing on the five-foot pier over the water, extended his hand to help Mrs. Lindrud off the boat and stepped back, at the same time, into an uncovered utility (water faucet) well, which was recessed in the pier, used to service the vessel. He fell and was injured.

Farmers, the Lindruds' homeowner insurance company, settled Mr. Thorson's claim and brought this action to recover on the primary INA yacht coverage for settlement costs and attorneys' fees, which together totaled $2,341.44.

The applicable phrase in the INA policy provides coverage for damages for which the insured shall become liable "by reason of his interest in the insured yacht".

The Washington Court of Appeals, Division I, following established precedent in the state (which requires the yacht to be only causally connected with, but not the proximate cause of, the accident for coverage) held that the insured did become liable for damages for bodily injury "by reason of his interest in the insured yacht". Thus the yacht insurance, as well as the homeowner's insurance, was applicable. Because of the "other insurance" clauses in the policies, the INA policy was primary. The court further found that

no controlling federal admiralty authority existed on the construction of the phrase in the INA policy in the context of the facts here presented.

LAW AND ARGUMENT

Following *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955), the cases are in agreement that state law controls the interpretation of a marine insurance policy unless there is established controlling admiralty authority already in existence. *Navegacion Goya, S. A. v. Mut. Boiler & Mach. Ins.*, 411 F. Supp. 929, (S.D.N.Y. 1975).

> The Supreme Court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 1955, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337, 1955 A.M.C. 46, reversing this Court, 5 Cir., 1953, 201 F.2d 833, 1953 A.M.C. 284, set out the now familiar principle applicable in the maritime insurance situations that, in the absence of federal legislation or a conflicting rule of law judicially established by the Federal Courts, state law would apply to the regulation of marine insurance matters. See, also, *Irwin v. Eagle Star Insurance Co.*, 5 Cir., 1972, 455 F.2d 827, 829. With respect to the issues to be decided in this case there is no firmly established regime of federal law and consequently we find ourselves controlled by Louisiana law.

Walter v. Marine Office of America, 537 F.2d 89, 94 (5th Cir. 1976).

Although a contract to insure a ship is maritime and within admiralty jurisdiction,

> That, however, does not determine whether the interpretation and application of the policy terms are to be governed by state or maritime law.

Irwin v. Eagle Star Ins. Co., 455 F.2d 827, 829 (5th Cir. 1972).

In particular, where interpretation of a marine insurance policy's Protection and Indemnity (P & I) clause is in issue, as here:

> In the absence of specifically controlling federal authority, the law of the state where a marine insurance contract is issued and delivered governs the construction of its language.

Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1976).

In its petition for a writ of certiorari INA asserts at page 9 that the Washington Court of Appeals recognized that certain federal cases held that the P & I clause would be inapplicable to losses incurred under similar circumstances involving commercial vessels. These cases are cited at footnote 5 on page 10 of INA's Petition. However, examining the opinion of the Washington Court of Appeals at page A-4, it is apparent the state court merely cited INA's argument that with a commercial vessel the P & I clause would provide no coverage. Thus the Washington court did not specifically decide that controlling admiralty law existed even for commercial vessels. The court stated at page A-4:

> We reject INA's argument because, at least in the non-commercial field, there is no well established federal rule, and without such a rule, the interpretation of marine insurance policies is left to the states.

The federal cases involving commercial settings were concerned with protection and indemnity clauses phrased in terms of liability arising where the insured becomes liable "as owner of" a particular vessel. Two of the cases involved separate policies on a tow or a barge and a tug. There the courts were deciding whether the insured be-

came liable as owner of the barge, on the one hand, or the tug, on the other. These cases are *Dow Chemical Co. v. Tug Thomas Allen*, 349 F. Supp. 1354 (E.D. La. 1972) which involved a tug owner navigating through a field of underwater gas lines without benefit of a chart, and *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580 (5th Cir. 1971) which involved a crew member on a utility tender alongside an oil drilling platform. In *Lanasse*, the court in disallowing the claim of the platform owner, Chevron, to coverage under the utility tender's policy, reasoned that Chevron, as an additional insured, did not become liable "as owner" of the utility tender. Instead, Chevron's liability arose out of negligence of a crane operator on its own platform.

A third case cited by INA, *Employers Mutual Liability Ins. Co. v. Aetna Ins. Co.*, 254 F. Supp. 263 (E.D. Mich. 1966), again involving a P & I clause, found that injury to an employee engaged in construction operations on a barge attached by a tow line to a tug was not a liability imposed by reason of ownership of the tug. The construction operations on the barge were wholly disassociated with the operation of the tug.

Wedlock v. Gulf Mississippi Marine Corp., 554 F.2d 240 (5th Cir. 1977) again involved a tug and barge. There an employee fell into a seawater ballast hatch left uncovered on the barge. The court held that the tug owner's insurance policy did not provide protection to the barge owner for his own negligence.

None of the above cited federal cases makes mention of whether federal or state law governs, nor do they dictate a clear federal admiralty rule to control claims here pre-

sented on the INA policy. The instant case does not involve tugs or barges with different owners.

Even if federal law were applied here, the INA policy would still provide coverage. The accident occurred while a guest was assisting one of the owners off the vessel and involved an open utility well used to service the vessel. The activities resulting in injury arose out of yachting and the insured's liability arose "by reason of his interest" in the vessel. If the clause were interpreted to require liability as owner, as in the federal cases cited above, since Mr. Lindrud, the owner, was liable, coverage would apply.

The Washington court has a genuine interest in following its own state law in resolving this dispute between homeowner and yacht insurance carriers for its resident. In *Irwin v. Eagle Star Ins. Co., supra,* the Fifth Circuit court noted the substantial and legitimate interest of the State of Florida in a coverage controversy between a Florida resident and a marine insurer whose policy was delivered in the state, in a case involving the sinking of a yacht in Florida waters. The court commented, at page 830:

> The plaintiff is no itinerant seaman of the class traditionally protected by the federal maritime jurisprudence.

Thus Florida law governed construction of the Inchmaree clause, as to whether a latent defect caused the sinking.

The court need not create additional admiralty rules in this context. "[T]he law of admiralty is specially designed for the shipping industry, not small pleasure boats." *Roberts v. Grammer,* 432 F. Supp. 16, 18 (E.D. Tenn., N.D. 1977). This case involves a dockside injury, to which admiralty jurisdiction does not normally extend. *National Union Fire Ins. v. United States,* 436 F. Supp. 1078 (M.D. Tenn. 1977).

A case involving very similar facts, but where the issue was jurisdiction, not insurance coverage, *Heim v. City of New York,* 442 F. Supp. 35 (E.D. N.Y. 1977), found that an injury caused by unsafe planking on a pier was not within admiralty jurisdiction. The plaintiff argued that the Admiralty Extension Act applied, alleging the accident was "caused by a vessel on navigable water" because the vessel, moored next to the pier, invited the plaintiff, without warning him of the danger, to come across the defective pier to load the vessel. The court reasoned, at page 37,

> Even if it be assumed *arguendo* that so placing the vessel was a sufficiently proximate cause of the injury to support a state law claim against Rogers, I do not believe that it can be said that the injury was "caused by a vessel" within the meaning of 46 U.S.C. § 740, The Admiralty Extension Act of 1948. That Act extended admiralty jurisdiction to injuries "done or consummated on land" but the Supreme Court has held that in determining whether there is admiralty jurisdiction over torts we must look to "the relationship of the wrong to traditional maritime activity." . . . Here the land based injury alleged is the result of a classic non-maritime tort. The injury did not result from the negligent handling of the vessel or any of its gear or appurtenances. In fact the role of the vessel in the chain of events is marginal at best. This is therefore a case where due regard for the states' independence should prompt a federal court scrupulously to confine its own jurisdiction within traditional maritime limits. . . .

CONCLUSION

The instant case involves a marine insurance policy, which although within admiralty jurisdiction, is governed by state law in the absence of specifically controlling federal law. The federal cases cited by petitioner do not involve comparable factual situations. Further, the court need not fashion a new admiralty rule, as the accident involved is outside the scope of traditional admiralty authority and does not involve the shipping industry.

The case presents issues best left to the state courts, which can work out solutions to the great variety of questions presented under yacht P & I clauses. The petition for writ of certiorari should be denied.

Respectfully submitted,

SKEEL, MCKELVY, HENKE,
EVENSON & BETTS
INGRID W. HANSEN
JOHN C. PATTERSON
Attorneys for Respondent